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RESPOND TO NEW YORK

August 1, 2007

Honorable Michael L. Orenstein, U.S.M.J.
United States District Court
Eastern District of New York
Long Island Courthouse
100 Federal Plaza
Central Islip, NY 11722-4438

Re: S&L Vitamins v. Australian Gold
05-CV-1217 (JS) (MLO)

Dear Magistrate Judge Orenstein:

We represent S & L Vitamins and Larry Sagarin in the above-captioned matter regarding defendants' letter of July 31 insisting on never-ending discovery. We do not understand how defendants can write as, they did, that they are not seeking any further discovery" and then request to issue subpoenas. Defendants' letter is full of innuendo and outrageous accusations, and despite defendants' non-compliance with Local Rule 37.3(c)[1] we are at the very least compelled to clarify the record.

First, the entire premise of defendants' request is that defendants were required for all time to purchase their products only from those suppliers from whom they bought a year ago. There is no order in this case requiring that. Nor is there an issue of perjury or false sworn statements here, which defendants raise cynically; there was no testimony by anyone that was tantamount to a promise by plaintiff not to change suppliers. (The lack of a citation to the relevant testimony here is telling.) Furthermore, defendants rely on a claim – also unsubstantiated – that I may have

[1] Despite defendants' self-satisfied claim of compliance, their letter is materially deficient. That Rule requires that the party resisting discovery be given **three days** to respond – not one.

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represented that my clients were not doing business in Europe. I have no recollection of such a statement, but if it was made, I certainly never represented that it never would do so in the future; nor would such a representation be material to this case nor even a basis for objection by defendants. Indeed, Mr. Sagarin testified about his company's overseas sales at his deposition (pp. 132-138) and never testified, much less undertook, that he would not continue to make such sales in the future except as to a specific customer.

Secondly, all discovery demanded in this case was seasonably provided. Defendants' inability to support its fanciful counterclaims on the facts elicited in discovery does not extend the discovery deadline indefinitely or until it does find something. Defendants' had no factual basis for claiming that plaintiff was purchasing its tanning lotion from AG distributors before this case began. It found none during discovery and well over a year of private investigation nor does it submit **any** independent proof of its claims with its letter of July 31st – merely "presumably" and "could only be." The truth is that defendants would find no proof of a purchase from a distributor even if discovery were continued until Doomsday. This is not only a simple fact, but it raises an important question: Why does defendant believe that plaintiff would be so stupid as to start knowingly buying from AG distributors after all the representations that have been made, and all the weight placed, on the fact that it does not do so, in this litigation, and thereby as much as hand defendant a key trophy on its tortious interference claim[2]?

This question is especially irksome considering the ample evidence already in the record that plaintiff has no reason to do such a thing. The testimony is clear that retailers willingly sell defendants' product cheaply enough to any enterprising businessman easily to undercut Australian Gold's obsolescing distribution system on price. Thus defendants have no facts to support a reopening of discovery, nor even a rational basis to explain why what it has failed to find so far might yet be out there, the very El Dorado sought by Australian Gold all this time, vainly as any conquistador. They have no facts – only "presumably" and "could only be."

The premises of defendants' requests are also deficient. They merely assert that because a large order has allegedly been placed in Europe, this "could only be fulfilled by an authorized distributor"; yet they do not even provide an affidavit by a person with first-hand knowledge of this business to support this speculative "could only" fantasy. Indeed they do not even authenticate their claim of knowledge as to what their private investigator supposedly "learned."

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[2] As a matter of preserving our position, please note that we do not believe that a ruling of tortious interference in such a case would at all be legally mandated, as we set out in our earlier motion to dismiss.

As for the law, defendants provide no authority for their position that a year after discovery is closed, they can – on a bare factual record and with no analysis as to how their proposed subpoenas would actually have an impact on the issues in this case – reopen discovery in this case.

Ultimately, defendants ask this Court for the opportunity to continue a fishing expedition that has already all but bankrupted our client, based on both legally irrelevant and factually unsupported assertions. We urge the Court not to be a party to this cynical tactic.

Very truly yours,

Ronald D. Coleman

cc: Plaintiffs' counsel (ECF and email)